

# WISCONSIN DEPARTMENT OF REGULATION & LICENSING



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**STATE OF WISCONSIN**  
**BEFORE THE DEPARTMENT OF REGULATION AND LICENSING**

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**IN THE MATTER OF THE DISCIPLINARY**  
**PROCEEDINGS AGAINST**

<b>DEAN W. HERBST,</b>	<b>FINAL DECISION AND ORDER</b>
<b>Respondent.</b>	<b>LS0007171RLC</b>

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DIVISION OF ENFORCEMENT CASE NO: 99 RLC 008

The parties to this action for the purpose of Wis. Stats. sec. 227.53 are:

*Dean W. Herbst*  
*7603 N Boyd Way*  
*Foxpoint, WI 53217*

*Valhalla Memorial Gardens*  
*(FKA Valhalla Memorial Park Association)*  
*5402 N 91<sup>st</sup> Street*  
*Milwaukee, WI 53225-3406*

*Department of Regulation and Licensing*  
*Division of Enforcement*  
*P.O. Box 8935*  
*Madison, WI 53708-8935*

The parties in this matter agree to the terms and conditions of the attached Stipulation as the final disposition of this matter, subject to the approval of the Department. The Department has reviewed this Stipulation and considers it acceptable.

Accordingly, the Department in this matter adopts the attached Stipulation and makes the following:

**CASE SYNOPSIS**

This disciplinary action is the result of an audit of the Valhalla Memorial Park Association, commenced by the Department in July 1998, pursuant to a request for Secretarial approval of the sale of the cemetery. The audit findings showed that some of the required deposits to the Perpetual Care Fund and Pre-Need Fund were not made within the statutory time periods. This reprimand is a result of the violation of that requirement.

**FINDINGS OF FACT**

- Dean W. Herbst** ("Herbst"), (DOB 3/5/48), is licensed in the State of Wisconsin as a Cemetery Salesperson, having license # 961146, first granted on November 22, 1996. Herbst is also licensed in the State of Wisconsin as a Cemetery Preneed Seller, having license # 101365, first granted on November 22, 1996. Herbst has renewed both licenses biennially thereafter.
- Valhalla Memorial Park Association** ("Valhalla") was licensed in the State of Wisconsin as a Cemetery Authority having license # 9533, first granted on December 31, 1965.

3. Valhalla Memorial Park Association was purchased by Robert Wainscott in 1999 and is now known as Valhalla Memorial Gardens ("Valhalla Gardens").
4. Herbst first became associated with Valhalla in 1994 when he served as a member of the Board of Trustees for the association. Sometime after his appointment as a trustee, Herbst was requested to serve as the Treasurer of the cemetery association.
5. Upon the subsequent resignation and departure of the General Manager, Herbst was hired as the cemetery director. Herbst was employed as the Cemetery Director from August 28, 1996 through December 28, 1998.
6. Herbst was employed by and reported to the Valhalla Memorial Park Association Trustees, which consisted of a Board of seven members: a salaried President, Treasurer, Secretary and four other Trustees who were remunerated for their duties.
7. Herbst was authorized to handle the day-to-day operations and management of the cemetery, including the deposit of funds in the Perpetual Care Fund, a pre-paid trust account required to be established on behalf of the depositor for care of the cemetery lots.
8. When Herbst became the Cemetery Director, he encountered various financial problems involving the operations of the cemetery, including a pre-existing deficit in the deposits to the Perpetual Care Fund and diminishing sales revenue for meeting the operational costs of the cemetery.
9. Herbst discovered in addition to the deposits deficit, that the cemetery had a payroll tax delinquency caused by the actions of a former employee. In late 1997, as a result of the delinquency, the State of Wisconsin Department of Revenue seized the bank account funds of the cemetery to satisfy the outstanding payroll tax delinquency, despite reassurances to Herbst that the cemetery would be granted additional time to repay the taxes.
10. The seized bank accounts of the cemetery contained operational funds and other moneys that were to be deposited into the Perpetual Care Fund. This action caused distress to the cemetery and was a partial cause of the fund deficit.
11. On or about November 30, 1998, Fredrick R. Luedke, the President of the Board of Trustees for the cemetery authority gave notice to the Department that the cemetery authority intended to sell the assets of the cemetery pursuant to Wis. Stats. sec. 157.08 (2)(b).
12. Prior to the approval of the cemetery sale, the Department audited the trust fund records of Valhalla. The audit was limited to a review of the business records of the cemetery to determine compliance with the deposits and record keeping requirements for the cemetery care trust fund and pre-need sales trust funds. The audit encompassed the cemetery operations for an eight-year period from 1991 through 1998.
13. The auditor found that the required trust accounts had not been established and the deposits had not been made in a timely manner. A review of the care fund trusting showed that no trust deposits were made for the period of August 1994 through January 1995, with only one deposit in July 1996 and July 1997. Neither deposits were attributed to a specific time frame. A copy of the audit report is attached as **Exhibit 1** and incorporated herein by reference.
14. The auditor also found that the pre-need trust account had no deposits since November 1994, the county grave spaces had no deposits and the care funds for the mausoleums were under-funded.
15. Herbst attempted to satisfy the care deposit requirement by making a deposit of \$4,000.00 in July 1997. Herbst was under the incorrect assumption that the build-up of capital gains, which met and substantially exceeded the perpetual care fund obligation attributable to him, could be considered deposited principal.
16. Herbst sought approval from the Board of Trustees to convert the capital gains on the existing fund, but his requests were denied. Herbst was not authorized to sell the stock and convert the surplus gains and earnings to principal without approval by the Board.
17. Herbst worked to obtain a bank loan to address the cemetery's operational funds shortfall, however, the final loan amount was less than had been requested and was not received timely. Because of the reduced loan amount and the requirement to pay the entire IRS penalty and interest out of the loan proceeds, the cemetery's financial difficulties were not resolved.
18. The original Departmental audit of the cemetery trust records determined that the cemetery had a total deficit of \$49, 114.44 in deposits to the care fund. A substantial portion of the fund deficit was not attributable to Herbst.
19. On December 28, 1998, the proposed buyers sold the stocks in the Perpetual Care Fund and received \$29, 162.00 after sale expenses, this amount being significantly greater than Herbst's obligation.

20. On April 14, 1999, the Department issued an agreement permitting the transfer and sale of the cemetery to new owners and included a requirement by the Department that Herbst shall not act nor be employed as an officer or an employee of Valhalla, shall not serve under any contract with the corporation, and shall not be involved in any capacity with the operations of the cemetery including, but not limited to, receiving payments on behalf of the either the cemetery or the corporation. The prohibition against Herbst was included in the Departmental agreement, prior to the verification of the audit findings, and had it not been contested by Herbst, would have terminated his employment.

21. The final agreement for the sale and transfer of the cemetery issued by the Department on May 12, 1999, was modified to only restrict Herbst's responsibility or authority for care funds maintained by or on behalf of either the corporation or the cemetery and the new buyer's agreement to deposit sufficient funds to cure the deficits in the care funds. A copy of the Notice of Approval for a Cemetery Conveyance is attached as **Exhibit 2** and incorporated herein by reference. The new owners presently employ Herbst as an Administrative Office Assistant/Office Manager.

22. Subsequent to the issuance of the final agreement, the new owners submitted additional materials to the Department regarding the withdrawal of funds that resulted in a credit of \$16,962.17 shown not to be improperly withdrawn from the care funds. The Department agreed that its initial audit findings were overstated by \$16,962.15 and the Department reduced the amount owed to the care fund to \$22,293.40, remaining after the cash deposit. A copy of the letter from the Office of Legal Services is attached as **Exhibit 3** and incorporated herein by reference.

### CONCLUSIONS OF LAW

1. The Department has jurisdiction to act in this matter pursuant to sec. 440.93 Wis. Stats.
2. The Department is authorized to enter into the attached Stipulation pursuant to sec. 227.44(5), Wis. Stats.
3. Respondent **Dean W. Herbst** has violated:
  - a.) Wis. Stats. sec. 157.11 (9g) (2) (c) by failing to deposit 15% of each payment of principal into a care fund within 30 days after the last day of the month in which the payment is received.
  - b.) Wis. Stats. sec. 440.92 by failing to deposit into a preneed trust fund an amount equal to at least 40% of each payment of principal that is received from the sale of cemetery merchandise under a preneed sales contract.
  - c.) Wis. Stats. sec. 157.12 (3) (a) (2) by failing to deposit at least 25% of each payment of principal received from the sale of a mausoleum space into a care fund, until the care fund equals 25 % of the cost of constructing the mausoleum.

### ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED, that the attached Stipulation be accepted.

IT IS FURTHER ORDERED, that **Dean W. Herbst's**, Cemetery Salesperson's license # 961146 and Preneed Seller's license # 101365 shall be, and hereby are, **Reprimanded**.

IT IS FURTHER ORDERED, that **Dean W. Herbst's** immediate supervisor shall submit three monitoring reports, each covering a two month period, over the course of six months beginning from the date of this Order. The monitoring reports shall consist of a written narrative outlining his licensed activities and attesting to his compliance with the rules and regulations governing his licensed activity. The reports shall be prepared and submitted to the Department no later than the 5th day of the following the reporting month. The reports shall be addressed and sent to the Wisconsin Department of Regulation and Licensing at the following address:

Department Monitor

Division of Enforcement

PO Box 8935

Madison, WI 53708-8935

IT IS FURTHER ORDERED, that Respondent **Dean W. Herbst** shall pay partial costs of \$300.00, within 90 days of the date of this Order by making payment of the same to the Department of Regulation and Licensing, P.O. Box 8935, Madison, WI 53708-8935. Payment shall be submitted within sixty (60) days from the date of this order. *Payment shall be made by certified check or money order, payable to the Department Monitor.*

IT IS FURTHER ORDERED, that in the event Respondent **Dean W. Herbst** fails to pay the costs set forth herein, and comply with the monitoring reports both his Cemetery Salesperson and Preneed Seller license shall be suspended without further notice and hearing and without further Order of the Department, and said suspension shall continue until further order of the Department.

IT IS FURTHER ORDERED, that file **99 RLC 008** shall be hereby closed.

Dated this 17<sup>th</sup> day of July, 2000.

**DEPARTMENT OF REGULATION AND LICENSING**

By:\_\_\_\_\_

Marlene A. Cummings, Secretary

(Case No: 99RLC 008, Costs: \$300.00)